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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-672

BURLINGTON NORTHERN INC., ET AL., *Appellants,*

v.

STERLING COLORADO BEEF COMPANY, *Appellee.*

On Appeal from the United States District Court for the District of Colorado

RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

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The Government has moved to dismiss the railroads' appeal on the ground that this Court lacks jurisdiction; the railroads should have appealed, says the Government, to the Tenth Circuit, citing *United States* v. *Interstate Commerce Commission,* 337 U.S. 426.

The railroads are, of course, delighted with this because a dismissal, if accompanied by an order to the district court to enter a fresh decree, would give the railroads another bite at the apple—this time in the

Tenth Circuit, and would, even if they lose there, delay the final day of reckoning. (The Interstate Commerce Commission requires payment of interest on reparations at an annual rate of 4%.)

Sterling's position is as follows:

1. Under *United States* v. *Interstate Commerce Commission, supra,* it is clear that the railroads should have appealed to the Tenth Circuit.

2. We believe that there is an area in which a three-judge court should have jurisdiction to decide one-judge issues, which issues should then be appealable to this Court. See, *e.g., Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73; *Paul* v. *United States,* 371 U.S. 245; *Zemel* v. *Rusk,* 381 U.S. 1; *Flast* v. *Cohen,* 392 U.S. 83; *Doe* v. *Lukhard,* 493 F.2d 54 (4th Cir. 1974); *Federal Power Commission* v. *Corporation Commission of Oklahoma,* 354 F. Supp. 137 (W.D. Okla. 1973). In this case there were clearly some issues appropriate for disposition by a three-judge court (see *Sterling Colorado Beef Company* v. *U.S., et al.* No. 76-757), and on this basis, this Court would have jurisdiction to review the one-judge issue.

3. But even if this Court decides that it is without jurisdiction of this appeal, it should in no event remand the case to the district court for entry of a fresh decree to enable appellants to notice a timely appeal to the Tenth Circuit:

A. The practice of remanding a case erroneously appealed to this Court for the entry of a fresh decree by the district court arose only in those cases where there was a legal uncertainty facing the appealing party as to where he should appeal. See *Phillips* v.

United States, 312 U.S. 246, 254, in which the Court remanded for entry of a fresh decree "where the question of jurisdiction was not obviously settled by prior decisions." The Court there cited an earlier Supreme Court decision in which it had stated:

> We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under section 266 been more definitely settled at the time the appeal to the Court was attempted. [*Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U.S. 386, 392].

Here, however, there was no uncertainty. *United States* v. *Interstate Commerce Commission, supra,* makes it clear that the railroads should have proceeded to the Tenth Circuit.

Moreover, most of the cases which have followed this procedure of remanding for entry of a fresh decree have been either civil rights cases where the human rights at stake might be thought to outweigh procedural niceties [*Perez* v. *Ledesma,* 401 U.S. 82; *Moody* v. *Flowers,* 387 U.S. 97], or involved questions of broad public interest and importance. *Wilentz* v. *Sovereign Camp, Woodmen of the World,* 306 U.S. 573; *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens,* 397 U.S. 821.

By contrast, the one-judge issue here is a purely private fight, involving only money, and the railroads are represented by sophisticated and highly competent counsel.

B. The railroads cannot even claim excusable neglect in failing to file a protective notice of appeal to

the Tenth Circuit. The Government, which was a defendant below, in order to protect its own appellate rights, filed a notice of appeal in this case *to the Tenth Circuit,* as well as to this Court. (The Government subsequently withdrew these notices of appeal.) The railroads apparently chose not to.

Moreover, the railroads were alerted at the very outset of this litigation of potential dangers in three-judge issues versus one-judge issues. Sterling filed two complaints, a one-judge complaint and a three-judge complaint (as well as a motion to consolidate) to ensure that there would be no problem with the district court's decision on this account.

C. Finally, we would question the legality of this Court's practice of remanding for entry of a fresh decree in order to reinvest a court of appeals with jurisdiction after expiration of a jurisdictional time limit. Regardless of the equities or the reasons for failure to file timely, this Court would not remand a case for entry of a fresh decree in order to give a litigant a new opportunity to file a petition for certiorari after the expiration of the statutory time in which to do so. Neither would a court of appeals remand to a district court for entry of a fresh decree in order to allow a litigant to appeal beyond the expiration of the time fixed for filing a notice of appeal to a court of appeals. Courts have generally regarded themselves as without power or authority to extend these time periods, either directly or indirectly. *Allegrucci* v. *United States,* 372 U.S. 954; *Department of Banking* v. *Pink,* 317 U.S. 264; *Berman* v. *United States,* 378 U.S. 530; *United States* v. *Robinson,* 361 U.S. 220; *Burnside* v. *Eastern Airlines, Inc.,* 519 F.2d 1127 (5th Cir. 1975); *Marten* v. *Hess,* 176 F.2d 834 (6th Cir. 1949). Yet, in effect, in the present situation an extension would be granted (if a fresh decree were entered) even though the railroads cannot even claim excusable neglect.

Another analogy which may be of interest to the Court arises in connection with interlocutory appeals under 28 U.S.C. 1292(b). There a petition for permission to appeal must be filed within ten days of the district court's order containing the prescribed 1292(b) statement. It has been held that the district court is without power, after the expiration of the ten-day period, to re-enter its order for the sole purpose of permitting a timely appeal. *Hanson* v. *Hunt Oil Co.,* 488 F.2d 70 (8th Cir. 1973); *Woods* v. *Baltimore & Ohio R.R.,* 441 F.2d 407 (6th Cir. 1971); *Nakhleh* v. *Chemical Construction Corp.,* 366 F. Supp. 1221 (S.D.N.Y. 1973).

These analogies make it clear that there is an inconsistency which this Court has never faced. But, in any event, the railroads have not brought themselves within the rationale of the *Phillips* case and the *Oklahoma Gas* case. Unlike the situation in those cases, *United States* v. *Interstate Commerce Commission, supra,* made it clear that the railroads should have appealed to the Tenth Circuit. The railroads cannot now complain if they are required to face the consequences of their having failed to do so.

Respectfully submitted,

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